Employment Court of New Zealand

Gaut v BP Oil New Zealand Limited [2011] NZEmpC 71 (23 June 2011)

Last Updated: 18 July 2011

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2011] NZEmpC 71

CRC 23/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN LEON BURGESS GAUT Plaintiff

AND BP OIL NEW ZEALAND LIMITED Defendant

Hearing: 4 - 6 April 2011 (Heard at Timaru)

Appearances: Tim Jackson, advocate for the plaintiff

Samantha Turner and Simon Clarke, counsel for the defendant

Judgment: 23 June 2011

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Introduction

[1] On 25 March 2009, Mr Gaut was summarily dismissed from his employment with BP Oil New Zealand Limited (BP) for swearing at his manager. He had been employed as a customer services representative at the BP Connect outlet in Timaru. At the time of his dismissal he was 24 years of age.

[2] Mr Gaut filed a statement of problem with the Employment Relations Authority alleging that he had been unjustifiably dismissed. In its determination,[1] the Authority found that Mr Gaut‟s dismissal had been justified. Mr Gaut challenged

that determination in this Court and sought a de novo hearing of the entire matter.

[3] The key issue for determination is whether Mr Gaut‟s summary dismissal and the investigation conducted by BP resulting in that dismissal met the test for justification prescribed in s 103A (as it then stood) of the Employment Relations Act

2000 (the Act). In other words, viewed on an objective basis at the time of the dismissal, were the actions of BP the actions a fair and reasonable employer would have taken in all circumstances.

Background

[4] Mr Gaut told the Court that between January 2008 and September 2008, before he began working for the defendant, he was employed at the independently owned BP Showgrounds Service Station as a customer services representative. That business closed down at the end of September 2008 and Mr Gaut was made redundant. The old service station was demolished and construction of the defendant‟s new BP Connect outlet began.

[5] Before he finished his employment at BP Showgrounds, Mr Gaut had been advised by BP that he would be employed at the new BP Connect outlet. He commenced duties on 4 November 2008. Mr Gaut had signed a written offer of employment dated 21 October 2008 and his terms and conditions of employment were those prescribed in the offer of employment and in the BP Employee Handbook. The handbook included a Code of Conduct which listed "what is considered as general and serious misconduct within our BP Stores."

[6] Relevant to the present case, the Code of Conduct defined "misconduct" as including, but not limited to: "Using insulting or abusive language that may cause offence to another person while at work." The definition of "serious misconduct" included, but was not limited to: "Assault or inciting while on store business and/or at a store."

[7] Mr Gaut"s working hours were to be in accordance with the store shift roster determined by the store manager. His standard hours of work were set at 40 hours per week but he was required to be available to work reasonable overtime at the "company"s discretion." The store manager at the BP Connect outlet at all material times was Ms Louise Lawrence.

The January 2009 incident

[8] Before turning to the incident in March 2009 which resulted in Mr Gaut"s dismissal, it is necessary to make reference to an earlier incident in January 2009 which assumed some significance in the course of the hearing. On 20 January 2009, Mr Gaut received written notice to attend a "disciplinary interview" on 22 January. The notice was headed: "BP Oil New Zealand Ltd Interview Acknowledgement/Consent Form". The reason for the interview was expressed in these words:

Using insulting or abusive language that may cause offence to another person while at work Refusal to perform usual duties or refusal to comply with fair, reasonable and lawful instructions of a manager or supervisor.

[9] No particulars were provided of the alleged offensive language and misconduct. The written notice appeared to be a generic form used by BP for convening disciplinary meetings. It had a number at the top, "12/6", which appeared to be the number allocated to that particular form (form 12/6). In the body of the form were two paragraphs which management were required to action:

Prior to this interview, I have been advised whether my actions are considered as *(Mmgt to tick)*:

]

General Misconduct Serious Misconduct

The purpose of the interview and the possible outcome of this interview are:

(Mmgt to tick)

No action Letter of concern Written Warning

Termination of Employment

All six boxes had been ticked by management before Mr Gaut was asked to sign the form.

[10] Mr Gaut arranged for Mr Glen Sole to be his representative at the disciplinary meeting on 22 January 2009. The BP representatives were Ms Louise Lawrence and Ms Melanie Popham, the retail area co-ordinator for the South Island. It appears that a number of matters were discussed at the meeting including Mr Gaut"s refusal to follow Ms Lawrence"s instructions when she had asked him to move a trailer in the forecourt of the service station; his refusal to take over the duties of another

employee while other staff members refilled the chiller and his swearing around the store. At the meeting Mr Gaut admitted that he had used the word "shit" in the office.

[11] The meeting continued on for some three hours. Ms Popham told the Court that: "Taking into account the fact Leon had sworn at Louise, back chatted and refused to follow a reasonable instruction, we considered disciplinary action was appropriate." It was decided that Mr Gaut would be issued with a "letter of concern". The one and a half page letter of concern dated 23 January 2009 was drafted jointly by Ms Popham and Ms Lawrence. It purported to summarise the meeting and record the undertakings Mr Gaut had given, including his agreement to refrain from swearing. Mr Gaut signed the letter of concern on 27 January 2009 acknowledging: "I have had the contents and meaning of this letter explained to me."

[12] There is nothing in the Code of Conduct providing for letters of concern. The Code of Conduct simply deals with warning letters stating that a first general misconduct offence may result in a first written warning, a second general misconduct offence may result in a final written warning and a third general misconduct offence may result in termination of employment. A serious misconduct offence may result in a final written warning or dismissal.

[13] There was another matter dealt with at the January meeting which had a direct bearing on the events leading up to the

dismissal. At the meeting, Mr Gaut raised an issue which had obviously been causing him considerable concern. It related to the failure of the staff working on the overnight shift to restock the chiller but signing off as though the work had been done. Mr Gaut‟s complaint was that he could spend up to three or four hours in a day restocking the chiller which was time he should have been spending on his normal duties. He said that Ms Lawrence agreed that it was her problem and it was something that she was sorting out.

The March 2009 incident

[14] The incident resulting in Mr Gaut‟s dismissal was described by him in these

terms:

15. On 24th March I started work at 6.00am. I had a scheduled list of jobs to do and began with those. At about 9.00am I went to the chiller to put the received boxes of drinks away. My job was to check them in. However, I saw that the fridge display area was more or less empty. That meant before I could do my job I had to stock it up. There were 51 boxes that had to be done and it was going to take hours. That should have been done already and was signed off as done, but as usual, it had not been. I was annoyed that yet again, the night workers had not done their work and left it to me in the morning. I knew they had time but that they just chose to leave them. They were signing off that they had done it when they hadn‟t. It was one of their allocated jobs and I had raised it with Louise over and over again because it put me under work pressure. It took hours out of my days and it was being noticed that I was not getting some of my jobs done. Louise had said she was dealing with it but in months nothing had changed. It was the main issue in January.

16. I was putting the empty boxes in the corridor (not in public/customer area) and had left the chiller to tidy the boxes and warm up a bit before going back in. Louise came around the corner and saw the boxes. I was on the other side of the boxes by the chiller door. She gestured towards the pile, which was the same as any other pile I had made there before, and said “What is this?” in an annoyed tone. She looked displeased and I felt that she was talking down to me. I was frustrated and I said to her “This is what I have been talking about”, meaning the backlog I was often left with that has been an issue for ages.

17. Louise then said the boxes were a health and safety issue. They weren‟t and it was obvious they weren‟t. She was getting at me and I said “I shouldn‟t have to spend up to 4 hours every second day on this”. I said in an annoyed way because I was annoyed. I would have raised my voice a little but I did not yell or shout it. Louise then said in a demanding and angry way “I am the manager and you don‟t tell me what to do. I will deal with the issue in my own time”. She raised her voice when she said that. I was annoyed and I turned back towards the chiller and said to her “Well best you do something about it”. I knew she did not like being told what to do and I accept that I was trying to get at her, but it was either say that or nothing and it just was not fair. Even so, I was careful about what I said. The only way I could deal with it was to walk back into the chiller then because it was a no win for me. She was the boss no matter what I thought was fair. Louise was not near me when I went into the chiller and the door could not have shut in her face.

[15] Describing the same incident, Ms Lawrence told the Court:

38. On 24 March 2009, I walked out of my office and saw a pile of boxes blocking the passageway. I thought that this pile of boxes would be a good example to use as a “what not to do” example in the staff training folder. I was about to return to my office to get a camera when Leon walked out of the chiller.

39. Before I could tell Leon what I was going to do, he started complaining loudly to me about the boxes, and said that this was what he was talking about during our previous discussions regarding the evening staff not restocking the chiller. Leon did not give me a chance to explain to him that I had only just seen the boxes myself and was about to take a picture of them to add to the training documentation, to use as a visual aid for staff.

40. Leon has said that when I saw the pile of boxes, I gestured towards them and said *“what is this?”* This is not correct. While I did gesture towards the boxes, I did not say *“what is this?”*

41. I tried to calm Leon down as he was talking so loudly that the customers and staff in the shop could hear. Leon did not respond to my attempts to calm him down, and instead continued to raise his voice. I tried again to talk to Leon, but he refused to listen to me and replied *“it’s your job, your fucking problem, you fucking sort it.”*

42. He then turned away and went into the chiller, shut the door in my face and left me standing in the hallway.

43. I was stunned by Leon‟s actions. While he had sworn at work on a previous occasion, he had been warned about back chatting and swearing at our meeting on 22 January 2009. He had agreed to refrain from back chatting and swearing. Leon had also agreed to maintain a professional attitude at all times.

44. After Leon disappeared into the chiller, I realised that Tracey [Frew] was standing next to me and had heard the whole encounter. Tracey asked me how Leon thought it was okay to talk to me, his manager, like that. I did not want to get into a discussion with Tracey about Leon, so I told her I would deal with it and shooed her back into the store.

45. I followed Leon into the chiller to try and sort the matter. As soon as Leon saw me he started arguing with me again about the evening staff and the drinks chiller. I asked him to lower his voice, but he ignored my request and carried on speaking in a loud tone. I could see the doors of the chiller being opened by customers and I knew that the volume of his voice would carry into the shop.

46. Leon has said that I lost my temper at him in the chiller, got stuck into him and backed him into a corner. I reject these comments. I went into the chiller to try and calm Leon and make it clear that his behaviour was not acceptable. I repeated to Leon three or four times to *"calm down"* and *"stop it"*, but he ignored my attempts to resolve the argument and carried on shouting at me. At no stage did I scream at Leon or back him into a corner. I was about two metres away from him. All I was trying to do was to calm him down and to move the discussion into my office so we could continue the discussion in private.

47. Leon has also said that I said in an angry way *"I am the manager and you don't tell me what to do. I will deal with the issue in my own time."* While I may have said to Leon that I was the manager

and that I know how to deal with the issue, I did not say this in an angry way. I was trying to get it across to Leon that the issue was my responsibility, and that I would deal with it.

48. I told Leon that the way he was speaking to me was not acceptable, and I would not stand for it anymore.

49. Leon said that he *"didn't give a shit"* and again said *"your fucking*

problem, you fucking sort it".

50. At that time I instructed him to go to my office. Leon refused to go, and only followed me there when I asked him for the third or fourth time.

[16] When she returned to her office, Ms Lawrence contacted Mr Greg Hill, her area manager, and Ms Popham for advice on how to proceed. She did not make any written statement about the incident, however, until sometime after Mr Gaut had been dismissed.

The investigation

[17] Another "disciplinary interview" was then convened for 25 March 2009 at

1.30 pm using the same BP Interview Acknowledgement/Consent Form described in

[9] above. The "Reason for Interview" was expressed in these terms:

Using insulting or abusive language that might cause offence to another person while at work

Acts that bring the company into disrepute on company premises or off site

Verbal assault while on store business and/or at a store

[18] Once again, all six boxes in the body of the form describing the type of misconduct and the possible outcome of the interview had been ticked by management. Prior to the disciplinary meeting, Mr Gaut was required to sign the interview form confirming that he had read the form and had its contents explained. Before signing, Mr Gaut deleted the words, "its content explained". He explained in evidence his reason for making the deletion:

I could see three things on the form in the box at the top and I asked Louise "What abusive language did I use towards you?" I said something like "I didn‟t swear or anything". What I meant by "anything" was the other things that the form said I had done or said. I was pretty worried and I asked Louise "what did I do that does that?" She replied "Verbal assault" and I said "What verbal assault? I didn‟t say anything to you" meaning anything that the form was suggesting. Louise did not answer that and I said I did not want to sign the form because the things I was supposed to have said/done

hadn‟t been explained as the form said they had. Louise said "You have to",

so I put a line though the words "its content explained" then signed."

[19] As in the case of the January meeting, Mr Gaut had again nominated Mr Sole as his representative. Mr Sole does not have a legal or employment relations background. He told the Court that he resides in Timaru and works in Ashburton commuting daily. He met Mr Gaut when he was a customer at the original independent BP service station. The defendant‟s representatives at the disciplinary meeting were again Ms Popham and Ms Lawrence. Ms Lawrence made some handwritten notes of the meeting which were produced in evidence but they are by no means a comprehensive record of the meeting which apparently started at 1.50 pm and concluded with Mr Gaut‟s dismissal at 7.25 pm. It had been a long day for Mr Gaut. He had commenced his shift at 6.00 am.

[20] The disciplinary investigation was conducted by Ms Popham. Prior to her appointment as retail area co-ordinator in

2008, Ms Popham had worked as regional operations co-ordinator for BP where her duties had included staff training and development, recruitment, coaching and other management support roles. Prior to her employment with BP, Ms Popham had worked for Tip Top Ice Cream Company Limited for 13 years and during the last five years of her employment with Tip Top she had held the position of workplace co-ordinator.

[21] Ms Popham began the disciplinary meeting by reading out the stated reasons for the interview from form 12/6 ([17] above). Mr Gaut denied swearing at Ms Lawrence. There was then a discussion about what Mr Gaut had agreed to at the disciplinary meeting in January as recorded in the so-called "letter of concern". It appears from the evidence that the meeting would have been going for sometime before Ms Popham put to Mr Gaut the written statement she had obtained from Ms Frew which set out the precise swear words he had allegedly directed at Ms Lawrence the day before. Up until that point in the meeting, Mr Gaut did not know what he was alleged to have said. When Ms Frew‟s statement was put to him, Mr Gaut again denied having sworn.

[22] Around that same stage of the meeting, Mr Gaut received a call on his cellphone from his flatmate. Mr Gaut told the Court that he had his cellphone

switched on because he had taken some photographs on his cellphone the previous day of the boxes in the passageway and the empty shelving in the chiller which he may have wanted to produce at the meeting. He said that the call from his flatmate was not important and when the phone rang for a second time and he saw that the flatmate was calling again, he said under his breath into the phone "oh piss off" and then he cancelled the call without answering**.** Ms Popham questioned Mr Gaut about his swearing into the telephone on that occasion and the incident was specifically referred to in the dismissal letter.

[23] Before turning to the evidence of Ms Frew and the other eyewitnesses, it is necessary to describe the layout of the passageway where the incident occurred in relation to the public area of the shop. The passageway is at the rear of the shop and is shaped something like a boomerang. Viewed from the front entrance to the shop, at the far left hand side of the passageway are the ATM machines and cash registers (referred to in the evidence as the point-of-sale, "POS"). Some of the witnesses referred specifically to point-of-sale number three (POS 3). Adjacent to the POS area is the BP Wild Bean Cafe coffee making facilities. Along the rest of that limb of the boomerang heading back towards the bend in the passageway are pie warmer cabinets. Customers may interact with and view BP employees along this part of the passageway. Around the bend there is then a covered area of passageway leading along to the chiller door which is right at the far end of the passageway. The incident in question took place in that covered area of passageway leading up to the chiller door. Half way along the covered passageway is what was referred to as the "staff only door" which staff use to go in and out from behind the counter to the public area of the shop.

[24] Ms Frew told the Court that between October 2008 and July 2010 she was employed by the defendant as an administrator at the BP Connect outlet in Timaru. Her responsibilities included daily banking and invoicing. In her statement, which was shown to Mr Gaut during the disciplinary meeting she said:

24/03/09

Leon → Louise

Outside chiller – in hallway

I first heard of the raised voices around the kitchen/POS 3 as walking around (to the shop door exit) *"Rung to verify this was as she was walking from behind POS out to the shop. Yes correct"** the words became [legible] at the [ambient]/Pie cabinets

I heard Leon & Louise – Leon said "You will have to Fucken sort it" "Your job, your fucken problem"

As I rounded the corner I noticed Louise, trying to stay calm & not [explode]

& Leon shutting the chiller door in her face.

I said "Everyone can hear [what‟s] going on" Louise shoo‟d me out the door to the shop.

I am in [total] disbelief that an employee can speak to his manager/boss in this way. My opinion his attitude & manner towards Louise is disgusting & a disgrace to BP.

*The words in italics were added to the statement by Ms Popham following a telephone call to Tracey.

[25] Unfortunately, there are obvious errors in the times Ms Lawrence recorded in her notes of the meeting for the commencement of the meeting and for some of the breaks taken during the meeting. It would appear, however, that perhaps another hour passed before Mr Gaut suggested to Ms Popham that she should obtain statements from two other employees who were working at the time, Ms Deanne Hamilton and Ms Lucy Johnson. Both Ms Hamilton and Ms Johnson were called at their home by telephone and asked to come to the service station. Ms Popham then requested them to provide written statements. In her statement, Ms Hamilton said:

To Melanie.

On Tuesday 24th March 2009 when Leon was doing the chiller, I was standing at the till of the cafe and I heard Leon say to Louise, “well best you do something about it then.”

They were his exact words. I did not hear him swear and that is all I heard.

When I took the empty milk containers, as I usually do, out to the storeroom I remember looking up the corridor seeing all the empty boxes and chiller door open.

When I heard Leon I was certain there was a customer in the cafe, because I

remember thinking, my god [there's] customers in the shop.

*As [Tracey] was walking by the cafe we both looked at each other with a puzzled look and I knew full well that she had heard what I heard. I was sure she was coming through the staff only door about the same time Leon said what he said.**

* The words in italics were added by Ms Hamilton later during the meeting at

Ms Popham‟s request after having been shown a surveillance video.

[26] In her written statement, Ms Johnson said:

[O]n Tuesday 24th March.

I was in the cafe while Leon was in the chiller, Louise walked past and it turned in to an [argument], not once in the [argument] did I hear any foul language from Leon

Went on break

Came back and went and put bag in locker then went in to kitchen where Jeanette was stocktaking, put a box away in freezer for her and then went out to POS3 where Deanna was talked to Deanna then Tracey came back through the door, just a couple of seconds before this I heard Leon say

*[“you] need to do something about this.” [A]nd then I went into the kitchen with Deanna where Jeanette was.**

* As in the case of Ms Hamilton, the words in italics were added by Ms Johnson later during the meeting at Ms Popham‟s request after having been shown the surveillance video. Ms Popham explained to the Court the reason for the additions to the statements of the two witnesses in these terms: “... so we could determine which witnesses were in hearing distance of Louise and Leon at the time Leon swore.”

[27] The issue of the surveillance video was another topic which assumed some significance during the course of the hearing. Video footage was available of the passageway and store area at the relevant time and this was shown to Mr Gaut and his representative as well as to the witnesses in the course of the disciplinary meeting. Ms Popham told the Court that later, she asked Ms Lawrence to make a copy of the video footage but, unfortunately, the surveillance system in the store overrode the video recordings automatically after a month and Ms Lawrence had failed to make a copy of the relevant footage within that one-month period. The video footage, therefore, was not available for the Authority investigation or the Court hearing.

[28] Ms Popham concluded from her investigation that the words Ms Hamilton and Ms Johnson overheard Mr Gaut uttering were spoken at a later point in time than the swear words Ms Frew had overheard. She told the Court that she based that conclusion on the evidence available to her, which she claimed was confirmed by the video footage, that Ms Frew was rounding the bend in the passageway heading towards the staff only door when she overheard Mr Gaut swearing and at that point both Ms Hamilton and Ms Johnson were stationary at the POS 3, which is near to where the coffee making machine was located. Ms Popham said that it was an issue of credibility and her conclusion from the evidence was that only Ms Frew was then in a position to be able to hear what was happening.

Discussion

[29] It seems to me that Ms Popham was reasonably entitled to reach the conclusion she did on the evidence that she had before her. Although the Court has not had the advantage of examining the video footage, both Ms Hamilton and Ms Johnson were clear in their evidence that when they overheard Mr Gaut, Ms Frew was in the shop area close to the staff only door. That is not where Ms Frew claimed to be positioned when she overheard the swearing. The fact that Ms Popham went to some trouble to ascertain precisely where the witnesses were located, indicates that she appreciated the significance of that part of the evidence.

[30] One possible explanation as to why Ms Hamilton and Ms Johnson may not have overheard the swearing Ms Frew described could be because they were standing by the coffee-making machine. Ms Frew explained to the Court that the noise in that area from the coffee grinding and “steam wand going” was significant and described the coffee machines as “rather

loud and busy". Admittedly, that evidence was not put to Ms Hamilton and Ms Johnson in cross-examination for them to comment upon, as it should have been, but it did not appear to be challenged by Mr Jackson, advocate for the plaintiff.

[31] Mr Jackson questioned Ms Frew"s credibility on the grounds that a "level of friendship" clearly existed between her and Ms Lawrence. They shared an office and the reason for the late start to the disciplinary meeting was because she and

Ms Lawrence had been inspecting a house at Temuka, which Ms Frew had recommended to Ms Lawrence who, at this stage, was looking for a property to purchase. Mr Jackson also referred to evidence that Ms Frew had to subsequently resign from BP for taking a gift card. For her part, counsel for the defendant, Ms Turner, challenged the impartiality of Ms Hamilton and Ms Johnson on the grounds that they and Mr Gaut "were colleagues from the old store" and there was a "sense of solidarity among the staff from the old store".

[32] The evidence regarding the gift card is clearly not relevant because s 103A requires the actions of the employer to be considered against the circumstances known at the time of the dismissal – not subsequently. I do not find any substance in the other allegations made by Mr Jackson and Ms Turner. All the witnesses appeared to be doing their best to accurately recall for the Court the relevant events which had, of course, occurred over two years previously.

[33] Both parties accepted the legal principle as stated by the Court of Appeal in *Waitemata District Health Board v Timu*2 that "obscene or abusive language" could be capable of being regarded as serious misconduct justifying dismissal. Responsibly, Mr Jackson did not try to dispute that if Mr Gaut had used the words complained of then, given their content, the defendant would have had justification for dismissing the plaintiff. What Mr Jackson strongly submitted, however, based on the decision of this Court in *Timu v Waitemata District Health Board*,3 was that there are two aspects to the test for justification. Not only must an investigation disclose misconduct capable of being regarded as serious misconduct but the investigation itself must also be conducted in a full and fair manner.4 Mr Jackson submitted that the defendant"s investigation was "flawed in many respects".

[34] Procedural fairness has particular significance in the present case not only because of the mandatory provisions of s 103A of the Act but also because of the specific contractual obligation the defendant had commendably assumed under its

written Code of Conduct which provides as follows:

2 [2007] NZCA 413, [2007] ERNZ 673 at [17].

3 [2007] ERNZ 419.

Procedural Fairness

Dismissals must be both substantively justified and carried out in a procedurally fair manner. When a dismissal occurs it must be supported by established facts, and the procedures followed in arriving at the decision to dismiss, as well as the carrying out of the dismissal must be demonstrably fair and reasonable.

The facts relied on to justify the dismissal must have been fully investigated, verified and documented. If the steps outlined in this policy are not followed, the disciplinary action may be found to be discriminatory, or the dismissal may later be found to be unjustified on the basis of procedural unfairness, even if there was a good reason for the dismissal.

[35] In many cases this Court is able to conclude that, notwithstanding procedural defects on the part of an employer in a disciplinary investigation, those failures or breaches are not sufficiently serious to result in unfairness or prejudice. In such cases, the Court will always be reluctant to categorise the employer"s conduct as

unjustified. In the recent decision of *Clarke v AFFCO NZ Ltd*,5 Chief Judge Colgan

concluded that none of the procedural failures or breaches, either individually or collectively, caused the employer to be disadvantaged or prejudiced by unfairness to the extent that his suspension and/or dismissal should be categorised as unjustified. In those circumstances, the Chief Judge considered the fairest way of dealing with the situation was to take the breaches into account in the making of the costs award.6

[36] In the present case, however, it seems to me that there is significant force in the plaintiff"s submission that the defects in the procedural steps followed by the defendant in arriving at its decision to dismiss the plaintiff were both "unfair" and "heavily prejudicial". As such, the defendant did not meet either the procedural fairness provisions in its own Code of Conduct or the test of justification under s 103A of the Act.

[37] I have already referred to the obviously unsatisfactory aspects of BP"s Interview Acknowledgement/Consent Form (form 12/6). By its very nature, a disciplinary investigation is personal to the employee concerned and dependent upon all the circumstances of the particular case. Moreover, under s 4(1A)(c) of the Act

an employer has a specific obligation to convey information relevant to any decision

that will, or is likely to, have an adverse effect on the continuation of employment of the employee under investigation. In those circumstances, it will be a rare occasion when it is appropriate for an employer to make use of a generic printed form to convene a disciplinary meeting without providing further particularised information to the employee about the focus of the investigation.

[38] The form gave no details whatsoever of the improper or obscene language the plaintiff was alleged to have used. Under s 4(1A) of the Act, and as a natural justice requirement, Mr Gaut was entitled to be provided with a copy of Ms Frew‟s written statement (which at that stage constituted the only written complaint) prior to the meeting but the evidence was that the statement was not shown to Mr Gaut until a considerable time after the disciplinary meeting had actually commenced. Because the plaintiff was unaware of the nature of the allegations against him, he was unable to contact potential witnesses to the events before the investigation meeting. When the plaintiff raised the fact during the investigation meeting that other witnesses may have relevant information, these witnesses were contacted and their accounts considered. But it would have been preferable had Mr Gaut had time to contact the witnesses and consider what these witnesses had to say before the meeting. This is another way in which the plaintiff was deprived of the opportunity to make his best case at the investigation meeting and illustrates the point that an employee must understand the allegation because he or she may have exclusive knowledge of information relevant to a fair determination of the allegation.

[39] Further, the form in question gave no indication as to whether the plaintiff ‟s actions were regarded by the defendant as “misconduct” or “serious misconduct”. Both boxes were ticked. The reference to “verbal assault”, which was the alleged action leading to his dismissal, was not a reference to any of the specific acts of misconduct referred to in the Code of Conduct. There was no indication given in the body of the form as to the likely outcome of the disciplinary meeting should the employer‟s investigation establish the misconduct alleged. Again, under this paragraph all the boxes were ticked. In the circumstances of this case, the ticking of every box on the form was inherently confusing and did not provide the information necessary for the plaintiff to prepare a satisfactory response or to put him on notice

about the severity of the possible outcome of the investigation. That is not how a fair and reasonable employer would have handled the situation.

[40] Additional prejudice to Mr Gaut followed on from the fact, to the knowledge of the defendant, that he was not represented by counsel or a person with any particular expertise or experience in employment disciplinary proceedings. Mr Gaut‟s representative, Mr Sole, was a customer at the BP service station. Mr Sole‟s wife worked and continues to work at the BP Connect outlet. Mr Sole no doubt did his best for Mr Gaut but it was clear from the evidence that as the lengthy disciplinary meeting progressed, Mr Sole found himself more and more out of his depth. First, he found himself confronted with Ms Frew‟s statement. Then there came the incident involving the phone calls from Mr Gaut‟s flatmate and Mr Gaut‟s response which Ms Popham began to hassle him about and later still Mr Sole learned, for the first time, about the existence of the surveillance footage.

[41] When the disciplinary meeting had commenced that afternoon, Mr Sole could perhaps have been forgiven for anticipating that the outcome would be something similar to the „slap over the wrist‟ outcome of the January disciplinary meeting. After all, the form convening the meeting followed exactly the same format. All the boxes were ticked giving no indication that the employer regarded the alleged conduct on that occasion as any more serious than the conduct complained of back in January. If anything, Mr Sole may have been more optimistic about the outcome of the March meeting because back in January at least Mr Gaut had admitted to swearing in the office whereas in March he had denied any wrongdoing and the notice convening the meeting gave no indication of the language Mr Gaut was alleged to have used. At that stage, Ms Frew‟s statement had still not been disclosed. While an employee has the right to choose any person as his or her representative, had Ms Frew‟s statement setting out the language complained of been disclosed prior to the meeting and had the notice convening the meeting given a clear indication that BP regarded Mr Gaut‟s misconduct as serious with dismissal being the likely outcome then I consider that Mr Gaut, either on his own initiative or on advice from Mr Sole, would have most likely retained counsel to represent him at the disciplinary meeting.

[42] For his part, Mr Sole admitted in cross-examination that he would not have even gone to the disciplinary meeting had Mr Gaut said the words complained of. The notes taken by Ms Lawrence reveal that at one point during the meeting Mr Sole asked Mr Gaut: “Are you nervous now?” and Mr Gaut answered: “Yes, my hand is sweating” – a rather strange exchange between an employee at a disciplinary meeting and his representative, which no doubt illustrates Mr Sole‟s naivety in these matters. In further evidence, which I accept, Mr Sole told the Court:

In the last part of the meeting I tried to buy some time by saying that we needed to get some advice. I certainly felt that I needed to because I was only really doing my best to support Leon on the day and I wanted to get him to a lawyer so that someone more influential than I could look at it and deal with BP. Melanie and Louise were not interested. I think it was at that time Louise supported Melanie by saying the time frames were different.

[43] The reference to the “time frames” was a reference to the video evidence. Advice of the existence of the surveillance

footage should have been given under s 4(1A) prior to the disciplinary meeting so as to avoid the type of ambush situation which Mr Gaut and his representative found themselves in. However, neither Mr Gaut nor Mr Sole knew anything about the existence of the video evidence until approximately halfway through the meeting itself. One of the points Mr Sole made in evidence was that it was apparent from the video evidence that at one point Ms Hamilton, Ms Johnson and Ms Frew all looked over in the direction of the covered passageway at the same time – the inference being that they all would have heard the words Mr Gaut used. Ms Popham recalled seeing on the video the three witnesses all turning their heads at the same time but she explained that that incident was just one of two different time frames shown on the video recording. As the surveillance footage is no longer available, it was not open to the Court to reach a view on the matter but it would no doubt have been a point which counsel or a more experienced representative would have wanted to fully explore at the meeting.

[44] There are a number of other unsatisfactory features of the disciplinary process adopted by the defendant in this case, not least of which are its unilateral actions in going outside the specific wording of its own Code of Conduct and creating a new form of serious misconduct, namely "verbal assault" and a new mode of disciplinary action, namely a "letter of concern". Ms Turner submitted that the term "verbal assault" could be described as "clumsily put" but it was "a genuine

effort to describe Mr Gaut‟s confronting and challenging conduct towards his [manager]". Mr Jackson described the term as a "fictional category" of misconduct which could only be a reference to the criminal offence of "assault" by another name. He submitted:

...the creation of a new name for something already covered by the code is simply a demonstration the employer was clearly aware of the limitations of the lower category: the defendant knew misconduct simpliciter would be insufficient for dismissal under its own classification system and rules *so* *before the investigation began*, decided to create a new category at [a] more serious level.

[45] Whatever the explanation, I have no doubt that the term confused Mr Gaut and when he asked Ms Lawrence what it was he had allegedly done that amounted to "verbal assault" she did not answer the question but simply told him that he had to sign the form. Mr Gaut told the Court that that was the reason why he had crossed out the words "its content explained" before signing the form. I accept Mr Gaut‟s evidence in this regard. Despite his specific inquiry, he was not told what the charge meant. Those are not the actions of a fair and reasonable employer.

[46] Likewise, in relation to the so-called "letter of concern" Mr Gaut had received from management after the January disciplinary meeting. Ms Popham told the Court that at the end of the January meeting she and Ms Lawrence were not satisfied with Mr Gaut‟s explanations and they "considered disciplinary action was appropriate". Instead of issuing a warning letter, however, which was what the Code of Conduct provided for, they proceed to compose the document headed "LETTER OF CONCERN". When asked by Mr Jackson: "How does a letter of concern fit in with the Code of Conduct system of warnings?" Ms Popham responded, "It‟s not a warning it is a letter of concern." The problem with that explanation is that it was clear from the evidence that, whatever its title, the defendant effectively treated the letter of concern as a warning letter and it was referred to regularly during the disciplinary meeting and specifically mentioned in the letter of dismissal. The mixed signals the defendant conveyed through its letter of concern are not what one would normally associate with a fair and reasonable employer.

[47] Then there is the inherent unfairness in the plaintiff being subjected to a five and a half hour disciplinary meeting (with some breaks) which began at 1.50 pm

notwithstanding the fact that he had commenced work that day at 6.00 am. There is also the additional inevitable unfairness resulting from the way in which the defendant reacted to the plaintiff‟s telephone calls from his flatmate during the course of the disciplinary meeting. Ms Popham agreed that Mr Gaut‟s reaction to the phone calls from his flatmate was one of the matters that had been taken into account in her decision to dismiss the plaintiff and it was specifically referred to in a lengthy paragraph in the dismissal letter. A fair and reasonable employer proposing to rely on an incident of this nature that arose in the course of the disciplinary hearing would, at the very least, have advised the employee and his representative to that effect and given the employee full opportunity to explain the situation. There is no evidence that the plaintiff had been warned at any stage of the meeting that his response to the cellphone calls from his flatmate was going to be used against him.

[48] The deficiencies and breaches outlined are not insignificant nor, in my view, are they the actions of a fair and reasonable employer. In this regard for example, I refer to the rather unsatisfactory evidence given in relation to the video surveillance footage which was not available to the Court. The points made by Mr Sole about the video showing all three witnesses looking towards the scene of the incident at the same point in time seemed to have some force and in fairness Mr Gaut should have been given the opportunity of having the footage examined by legal counsel or perhaps a person with special expertise in that field. He was deprived of that opportunity, however.

[49] For the reasons touched upon, I have concluded that the defendant‟s disciplinary investigation into the allegations of misconduct against Mr Gaut involved significant procedural irregularities which were neither fair nor reasonable and to that extent Mr Gaut‟s dismissal was unjustifiable in terms of s 103A of the Act.

Remedies

[50] The plaintiff has claimed lost earnings in the sum of $3,868.32 for the first three months and $533.44 per month thereafter up until December 2010. The defendant has not challenged the makeup of the claim but has pointed to the paucity

of evidence relating to the plaintiff‟s obligation to mitigate his loss. I agree with Ms Turner‟s submissions in this regard. The amount awarded under s 123(1)(b) of the Act is fixed in the sum of $3,868.32.

[51] The plaintiff claims compensation for non-economic loss pursuant to s 123(1)(c) in the sum of $12,000. There was evidence to support such a claim. After his dismissal, Mr Gaut became depressed. He had been working his way out of debt but, because of his dismissal, he was unable to continue paying off a term loan. His motor vehicle was seized and he lost his flat because he could not afford to continue paying the rent. Later he applied to the No Asset Procedure programme established by the Ministry of Economic Development and he was placed under statutory management for 12 months. Responsibly, he told the Court that he did not blame anyone else for his financial situation at the time of his dismissal but he claimed that at that stage he had rearranged his debts and had been managing his financial situation in the best way he could. The amount I award the plaintiff for his non-economic loss is $8,000.

Contribution

[52] Section 124 of the Act requires the Court to reduce remedies to reflect the extent to which the actions of the plaintiff contributed towards the situation resulting in his dismissal. Evidence of such contribution must be established to the usual standard of proof in civil proceedings, namely, on the balance of probabilities. I am satisfied on the basis of the evidence presented to the Court that the plaintiff did use the insulting and offensive language complained of. In this regard, Ms Frew was a convincing witness and her evidence was unshaken in cross-examination. I accept that the incident Ms Hamilton and Ms Johnson described took place, but that was at a later point of time when Ms Frew was walking back through the “staff only door” from the shop into the passageway. The open doorway probably made it easier for the two witnesses to overhear what Mr Gaut was saying in the covered passageway. I stress that my findings in this regard are based on the evidence as it was presented in Court but what it all means is that I am prepared to accept that Mr Gaut‟s actions contributed in a significant way towards the situation resulting in his dismissal.

[53] Ms Turner contended that the case arose “directly and only from Mr Gaut‟s insulting and abusive language and behaviour towards Ms Lawrence” and therefore, in terms of his contribution, his awards should be reduced to nil. I am not prepared to go that far. One of the puzzling features of the case was why the defendant, and in particular Ms Lawrence, had not taken action earlier to deal with Mr Gaut‟s ongoing complaint that staff working nightshift were signing off work which they had not carried out. That in turn meant that Mr Gaut could find himself spending up to three or four hours in a particular day carrying out the work himself at the expense of his regular duties. It is hardly the action of a fair and reasonable employer simply to allow that type of situation to continue seemingly, from Mr Gaut‟s viewpoint, unchecked. To her credit, Ms Popham faced up to the unsatisfactory situation. She told the Court:

I can definitely understand his (Mr Gaut‟s) frustrations and I know that Louise was dealing with it. She‟d taken photographs and put together a training plan and was dealing and managing those staff.

Whatever Ms Lawrence was doing about the problem, however, was in my view, not enough.

[54] Taking these matters into account, I consider that the appropriate reduction to be made to the remedies I have just awarded on account of the plaintiff‟s contributory behaviour should be fixed at 60 per cent and I so order.

[55] The plaintiff seeks interest on the award made under s 123(1)(b) for loss of wages. I accept that the Court has jurisdiction to award interest by virtue of cl 14 of sch 3 to the Act but it is a discretionary power which is subject to the Court‟s overriding equity and good conscience jurisdiction under s 189 of the Act. I have found that the plaintiff, by his conduct, contributed significantly to the situation that gave rise to his dismissal and in order to reflect the Court‟s disapproval of his conduct in that regard and the equity of the case, I decline to make any award of interest.

Costs

[56] The plaintiff is entitled to a reasonable award of costs. I would like to think that the parties will be able to reach agreement as to an appropriate figure in this regard but if that does not prove possible then Mr Jackson is to file a memorandum within 21 days and Ms Turner will have an additional 21 days in which to file a response.

A D Ford

Judge

Judgment signed at 2.30 pm on 23 June 2011

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[1] CA 116/10, 11 May 2010.
